LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

Supreme Court, U.S.
FILED
MAR 26 1966
JOHN F. DAVIS, CLERK

No. 572

THE ALLBRIGHT-NELL COMPANY AND PETER ECKRICH AND SONS, INC.,

Petitioners,

vs.

CARL SCHNELL AND THE GRIFFITH LABORATORIES, INC.,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

RICHARD D. MASON,
M. HUDSON RATHBURN,
ROBERT L. ROHRBACK,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Petitioners.

Of Counsel:
NICHOLAS M. ESSER,
840 North Michigan Avenue,
Chicago, Illinois 60611,
CLEMENS HUFMANN,
20 North Wacker Drive,
Chicago, Illinois 60606,
RONALD L. ENGEL,
DANIEL W. VITTUM, JR.,
130 East Randolph Drive,
Chicago, Illinois 60601.

THE SUTTON-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 572.

THE ALLBRIGHT-NELL COMPANY AND PETER ECKRICH AND SONS, INC.,

Petitioners,

vs.

CARL SCHNELL AND THE GRIFFITH LABORATORIES, INC.,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

Petitioners pray that this Court grant rehearing of its order of March 7, 1966, denying the petition for a writ of certiorari, 34 U. S. L. Week 3305, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-captioned case as prayed for in the petition filed September 15, 1965.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The decisions of this Court in *Graham* v. *John Deere Co., Calmar, Inc.* v. *Cook Chemical Co.*, and *Colgate-Palmolive Co.* v. *Cook Chemical Co.*, 34 U. S. L. Week 4119 (Nos. 11, 37, and 43—October term, 1965), decided Febru-

ary 21, 1966, raise the following new and substantial issues that could not have been anticipated in our petition for certiorari:

(1) In this case both the District Court and the Court of Appeals for the Seventh Circuit held valid and infringed eighty-two claims of seven patents granted to Carl Schnell covering a single machine and method for comminuting meat and agricultural products.* In upholding the District Court, the Court of Appeals recognized that:

> ... Mr. Schnell's real discovery [was] that one secured a superior product and greatly increased output when the meat, fat and water were comminuted and discharged in the absence of air by sealing off air from the column of meat passing through the machine.

Schnell's "real discovery" thus amounted to no more than the use of a seal around the drive shaft of a prior art comminuting machine such as the one disclosed in Hortnagl Austrian patent No. 179,437.**

The attempt to predicate patent protection on the mere presence of a seal is reminiscent of *Calmar, Inc.* v. *Cook Chemical Co.* and *Colgate-Palmolive Co.* v. *Cook Chemical Co.* (hereinafter jointly referred to as the *Cook* case), *supra,* in which the validity of Scoggin U. S. Patent No. 2,870,943 (covering a shipper-sprayer for containers of liquid products) turned on the position of a seal—except that in those cases only one patent was involved, whereas in this case seven patents comprising eighty-two claims were held valid and infringed. This Court held in *Cook* that

---

* The findings and conclusions of the District Court are reported at 242 F. Supp. 891, and the opinion of the Court of Appeals (reported at 348 F. 2d 444) is reprinted as Appendix A to the petition for certiorari.

** A copy of the Hortnagl patent drawing is appended as Appendix B to the petition for certiorari.

so obvious a difference as the placement of a seal prevented the Scoggin shipper-sprayer from meeting the standard of invention embodied in 35 U. S. C. § 103. Likewise, here, the same result should be reached; Schnell's use of a prior art seal in a prior art comminuting machine manifestly does not meet the standard of nonobviousness set forth by this Court, and both courts below clearly erred in holding it did.

It is difficult enough to conceive of one patent being sustained on so flimsy a basis as that presented in this case. The result below is all the more suspect since it involves a holding that seven patents and eighty-two claims are all valid and infringed. Likewise, the reliance placed by the courts below on commercial success, long felt want, and the like, should not, as it did not in *Cook*, obscure the obviousness of the claimed inventions. The opinion of the Court of Appeals purported to uphold the validity of certain of the Schnell patents based on the solution of "subsidiary problems". In view of the marginal nature of Schnell's "real discovery", it is difficult to imagine what these "subsidiary problems" are (the Court did not even state what they were) that supposedly warrant judicial sanction of seven seventeen year monopolies amounting to at least twenty-one years of patent dominance over an industry.

(2) The decisions of the courts below upholding the validity of seven patents and eighty-two claims based on the "real discovery" involving the combination of a prior art seal and a prior art comminuting device is apparently attributable to the District Court's position that prior art comminuting devices (e.g., grinders, colloid mills, etc.) are somehow non-analogous or non-pertinent with respect to emulsifiers described and claimed in the Schnell patents. The findings of the District Court, especially Finding No. 204, in effect state that grinders are so different

from emulsifiers that all grinders should be relegated to the category of non-pertinent prior art. These findings (which, along with all of the District Court's findings, were adopted verbatim from the respondents' proposed findings) are clearly erroneous in view of the *Cook* decisions.

In *Cook,* the patent owner argued that certain of the prior art was not pertinent because it related to liquid containers having pouring spouts rather than to pump sprayers. This Court noted the error of such a position:

> . . . so restricted a view of the applicable prior art is not justified. Problems confronting Scoggin in the insecticide industry were not insecticide problems; they were mechanical closure problems. Closure devices in such a closely related art as pouring spouts for liquid containers are at the very least pertinent references. 34 U. S. L. Week at 4128.

Here, prior art grinders, colloid mills, and other comminuting devices would similarly seem at the very least to be highly pertinent references. Indeed, the very language of the Schnell patent claims recognizes the close relation between emulsifying meat and grinding other material. For example, claims 11-16 inclusive of Schnell U. S. Reissue Patent No. 24,683 specifically cover "a method of comminuting meat and agricultural products . . .".* In view of this, the District Court's Finding 204 and the consequent treatment of the prior art given pursuant to this finding are clearly in error, and we submit that at a minimum the case should be remanded for reconsideration in light of this Court's decisions. See, e.g., *Bradley Mining Co.* v. *Boice,* 345 U. S. 932 (1953). In view of the improper findings and conclusions by the courts below, all

* In fact, of the sixty-six claims of the other six patents in suit, twenty-one claims are directed broadly to "materials" generally; thirty-seven claims merely specify "food products"; six claims recite "meat and agricultural products"; and only two claims (5 and 10 of U. S. Reissue Patent No. 24,674) are specific to the comminuting of meat.

of the patent validity issues should be reconsidered, with proper weight being given the prior art comminuting devices.

(3) Petitioners have heretofore vigorously contested the validity of all of the seven Schnell patents involved in this case. However, even assuming arguendo that Schnell's "real discovery" that sealing air out of a column of meat passing through a comminuting machine somehow rises to the level of a patentable invention, the granting of the first of the seven Schnell patents (i.e., U. S. original Patent No. 2,836,825, dated May 27, 1958, reissued August 18, 1959 as U. S. Reissue Patent No. 24,683) containing claims directed to Schnell's method for comminuting meat and agricultural products fully exhausted the Patent Office's power to grant valid patent protection to Schnell. In view of the pertinent prior art, the particular mechanical arrangement of admittedly prior art elements selected by Schnell to carry out his assumedly patentable method cannot rationally support even one additional patent, let alone a total of seven patents that extend the patent monopoly over at least a twenty-one year interval.

That the Patent Office may, in an outburst of administrative efficiency, have purged its files of pending Schnell applications by granting six additional patents (not to mention the further grant of two reissue patents) is a classic example of the tendency of the Patent Office to churn out patents in record numbers, as if that were an end in itself. One is reminded of the all too accurate statement of Learned Hand in *Lyon* v. *Boh*, 1 F. 2d 48, 50 (S. D. N. Y. 1924), *rev'd on other grounds*, 10 F. 2d 30 (2d Cir. 1926), that:

> . . . the antlike persistency of solicitors has overcome, and I suppose will continue to overcome, the patience of examiners, and there is apparently always but one outcome.

While the objective of diminishing the backlog of pending patent applications is of course admirable, as pointed out in this Court's decisions in *Graham* and *Cook, supra,* the Patent Office has all too often been guilty of applying notoriously low standards of patentable invention and a free reign has often been exercised by Patent Office Examiners in their use of the concept of "invention". The present case would appear to be a particularly extreme example of this —seven patents and eighty-two claims covering at best a single invention, a method for comminuting meat and agricultural products. For this reason alone, the decisions below are in error.

(4) The consequence of the decision reached by the District Court and affirmed by the Court of Appeals for the Seventh Circuit passes far beyond the specific issues of patent validity and infringement presented herein. The effect of this decision and the entry of the injunction sought by respondents will necessarily result in respondent, Griffith Laboratories, Inc., obtaining and maintaining a monopoly position in the manufacture of machines of the character described in the various Schnell patents for the remainder of a twenty-one year period blanketed by the seven Schnell patents. Respondents have not offered licenses to petitioners and there is no indication in the record that licenses have been offered or made available to any others. Instead, respondents seek to maintain a monopoly position until July 17, 1979, the date of expiration of the last Schnell patent and a date twenty-one years after the issuance of the Schnell original Patent No. 2,836,-825 on May 27, 1958.*

* This patent was reissued as U. S. Reissue Patent No. 24,683 on August 18, 1959. Petitioners and others in the sausage industry are nominally entitled to utilize the method reissue patent by virtue of a revocable release granted February 9, 1962 (P. App. 3), but under the decisions below respondents are nonetheless permitted to maintain their monopoly position in the industry through monopolization of the only known apparatus for carrying out the method by virtue of the six other patents in suit.

If the machine and method related to products of relative commercial insignificance perhaps such activities could be condoned or would not warrant this Court's intervention. However, as amply demonstrated by the record and the opinions of the courts below, the machine and method are used in the manufacture of meat products of the frankfurter and bologna variety. As the record shows (D. App. 159, 1002), millions of pounds of products of this character are processed each week, and the anti-competitive consequences of the decisions below are obvious. These considerations require, we submit, that the utmost care be given to the disposition of the issues respecting validity and infringement of the Schnell patents.

The decisions of the courts below are clearly contrary to the standards of invention set forth by this Court in the *Graham* case and the *Cook* cases, *supra*. Mere prospective application of these cases would leave undisturbed a decision manifestly erroneous under the standards set forth therein. We submit that fairness and justice require that, in order to achieve the uniformity and definiteness called for by this Court in *Graham* and *Cook*, this case be reconsidered in light of the standards set forth therein.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RICHARD D. MASON,
M. HUDSON RATHBURN,
ROBERT L. ROHRBACK,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Petitioners.

Of Counsel:

NICHOLAS M. ESSER,
840 North Michigan Avenue,
Chicago, Illinois 60611,

CLEMENS HUFMANN,
20 North Wacker Drive,
Chicago, Illinois 60606,

RONALD L. ENGEL,
DANIEL W. VITTUM, JR.,
130 East Randolph Drive,
Chicago, Illinois 60601.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

M. HUDSON RATHBURN,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorney for Petitioners.